ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF KANSAS.[1]

SUPREME COURT OF MARYLAND.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME COURT OF NEW YORK.[4]

SUPREME COURT OF PENNSYLVANIA.[5]

ACTION.

Contract or Tort— Waiver of Tort.—In many cases where one has received goods wrongfully, a contract of purchase will be inferred, and the owner may waive the tort and recover for goods sold and delivered: *Deysher* v. *Triebel*, 64 Penna.

If there be no fraud a recovery cannot be had under a count for goods sold and delivered, for the specific articles in the possession of a defendant: *Id.*

Where a person tortiously in possession of another's goods converts them into money or securities, assumpsit for money had and received may be maintained: *Id.*

The count for money had and received is governed by equitable principles, and lies only where the defendant *ex æquo et bono* ought to refund the money received: *Id.*

Where there has been no deceit or unfair practice and the defendant may with good conscience retain the money, he cannot, on a count for money had and received, be compelled to repay, although he could not have recovered it originally: *Id.*

T. sent shingles to J., which were delivered to D. In an action by T. against D. for goods sold and delivered, D. might show that he received the shingles by mistake, supposing they had been sent to him by K., with whom he had been dealing, and that he had settled with K. and paid him without knowledge of the mistake: *Id.*

AGENT.

Broker finding a Purchaser.—Where a court, in its charge, has once correctly stated the law, it is not error to refuse a restatement: *Gillet* v. *Corum*, 6 or 7 Kansas.

An agent employed to sell real estate, and finding a purchaser, and bringing him and his principal into communication, and setting on foot negotiations which result in a sale, cannot be deprived of his right to compensation by a discharge prior to the consummation of the sale: *Id.*

ATTORNEY.

Acceptance of Service.—An attorney making an acknowledgment of

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[1] From W. C. Webb, Esq., Reporter; to appear in 6 or 7 Kansas Rep.

[2] From J. S. Stockett, Esq., Reporter; to appear in 33 Md. Rep.

[3] From H. K. Clarke, Esq., Reporter; to appear in 20 Mich. Rep.

[4] From Hon. O. L. Barbour, Reporter; to appear in vol. 58 of his reports.

[5] From P. F. Smith, Esq., Reporter; to appear in 64 Penn. Rep.

service, on the back of a summons, will, in the absence of proof to the contrary, be presumed to have had authority for so doing: *Hendrix* v. *Fuller*, 6 or 7 Kansas.

Where one of two defendants in the county in which suit is brought acknowledges service on the back of the summons, a summons for the other defendant may rightfully issue to another county: *Id.*

A plaintiff may join in one action as defendants, the maker and guarantor of a note: *Id.*

Betting.

Return of Deposit.—Where two persons bet on a horse-race, and deposit their money with a stakeholder, either party may, while the money still remains with the stakeholder, and before the race is determined, demand a return of his deposit; and if the stakeholder refuse, the depositor may maintain an action against him for the amount of the deposit: *Cleveland* v. *Wolf*, 6 or 7 Kansas.

Bills and Notes. See *Attorney.*

Consideration—Evidence—Arbitration.—Under an answer in a suit on a promissory note which alleges in general terms that the note was given without any consideration whatever, the defendant may offer testimony going to show a want of consideration, and the plaintiff may prove any consideration: *Miller* v. *Brumbaugh*, 6 or 7 Kansas.

A claim for compensation for labor and material which is not in suit may, by consent of the parties, be referred to arbitrators, and their award is conclusive unless impeached: *Id.*

The giving of a note for the amount of an award is a waiver of irregularities in the arbitration proceedings: *Id.*

Forged Endorsement.—If, in an action against an endorser of a promissory note by the *bonâ fide* holders thereof, it be shown that the endorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note, and its transfer to the plaintiffs, he is not liable: *Woodruff* v. *Munroe*, 33 Md.

But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bonâ fide* holder: *Id.*

But any admissions by the defendant made subsequently to the maturity of the note, would not be evidence that he had authorized the endorsement of his name thereon: *Id.*

Payment by Party interested.—The payment, after maturity, of a promissory note secured by a mortgage, by a party who had acquired the mortgagor's title to the mortgaged premises, by conveyance expressly made subject to the mortgage, extinguishes the note; and if it be afterwards put in circulation no recovery can be had upon it: *Appledorn* v. *Streeter*, 20 *Mich.*

Possession of Note—Evidence of Payment.—Birkey made a note payable to T. who endorsed it; it was afterwards endorsed "J. & B. McMakin." Four years after its maturity and after the death of B. McMakin, it was found amongst his papers. In a suit by J. McMakin as survivor, evidence was given, that B. McMakin directed credit for the

amount of the note to be given to an account of defendant against J. & B. McMakin. *Held*, to be evidence of appropriation to that account: *Birkey* v. *McMakin*, 64 Penn.

Under this evidence, the defendant's book of original entries against B. McMakin and J. B. McMakin was evidence: *Id.*

The endorsement "J. & B. McMakin," and the note being found in possession of B. McMakin, was evidence that the note belonged to him and he had the right to make the appropriation: *Id.*

The note was unclaimed in the possession of B. McMakin for four years after maturity and until after his death. *Held*, to be corroborative of the ownership of B. McMakin and of his appropriation to the accounts: *Id.*

Broker.

Stock—Purchase by Broker—Ability to deliver at any time.—Seal, a broker, bought stock on the order of Wynkoop, paid for it, and informed him of the purchase. The stock was delivered to Seal; he frequently asked Wynkoop to take the stock, and although there might have been times when no stock was in his name, he could at any time have delivered it to Wynkoop, who never requested a delivery. Seal might recover for the money advanced: *Wynkoop* v. *Seal*, 64 Penn.

Wynkoop was estopped from alleging that Seal could not comply, having never offered payment or demanded delivery of the stock, and Seal being ready to deliver at the time of trial: *Id.*

It was not error to refuse to charge, that the plaintiff could not recover, because at some intermediate time, Seal had not the stock standing in his name or had temporarily hypothecated it: *Id.*

Shares of stock are alike, and a transfer procured to be made by another of the stock would have been a compliance: *Id.*

Carriers.

Nature of their Liability.—Common carriers are liable in two capacities; one as insurers and one as warehousemen. If an injury happened to goods from any cause except the act of God or the public enemies, while the carriers are insurers, an action lies against them by the owners for damages, and is made out without further inquiry: *Goodwin et al.* v. *The Baltimore & Ohio Railroad Company*, 58 Barb.

But if the injury happens after the goods are claimed to have been delivered, the question arises whether the defendants' liability as common carriers, in all its rigor, had, under the circumstances, ceased; and if so, whether the defendants had exercised that care of the property required of them as warehousemen: *Id.*

Delivery, what amounts to.—Carriers are bound to deliver goods transported by them. Delivery is not effected by placing the property in a position where it cannot be obtained by the owner or consignee: *Id.*

A quantity of sheet-iron, consigned to the plaintiffs, at New York, and transported by the defendants, was unloaded upon the wharf, in New York. The plaintiffs received notice of the arrival of the ship in which the iron was brought, and received a small portion of the iron uninjured. On sending for the remainder, they were unable to get it until some days after it was placed upon the pier, by reason of other freight hav-

ing been so placed that the iron could not be reached. While in this position, it was damaged by rain. *Held*, that the defendants were bound to deliver the goods at the usual place, and to deliver them in a conveniently reasonable method for their removal; and that the plaintiffs were bound to exercise reasonable diligence in removing them: *Id.*

Notice of Arrival of Goods; Removal.—Held also, that it was for the jury to determine whether a reasonable time had elapsed after notice of the arrival of the iron, for the plaintiffs to remove it, before it was injured by the rain. That after the expiration of a reasonable time, the liability of the defendants as insurers ceased, and their duty or liability became that of warehousemen, which required that they should exercise over the property, and for its protection, ordinary care and diligence: *Id.*

Want of ordinary Care and Diligence; Burthen of Proof.—That the burthen of proof was upon the plaintiffs to show that the defendants did not use such care and diligence; and if the jury found that negligence was proved, the defendants were liable, even though their duty as common carriers was ended: *Id.*

Rule of Damages for Breach of Contract.—The rule of damages which prevails in an action for the breach of a contract to transport goods, where the owner is unable to procure the goods to be carried in any other manner, does not apply when, upon the failure of the carrier to perform, the owner of the goods can send them by another conveyance: *Grund* v. *Pendergast*, 58 Barb.

In such a case the owner must send the goods by another conveyance; and if he does so, he will be entitled to recover the difference between the price at which the defendant undertook to carry the property and the price which the owner was compelled to pay for its transportation: *Id.*

Corporation.

Injury to Private Property by Construction of Canal.—The use of the canal of an incorporated company cannot be rendered contingent by injunctions to restrain it on allegations of injuries to private parties by its construction or use: *Union Canal Company's Appeal*, 64 Penna.

Where there is a provision in an act incorporating a canal company, &c., for injuries for taking private property, the mode designated must be pursued: *Id.*

The Constitution does not require consequential injuries to be prepaid: *Id.*

A bill was filed to restrain defendants from diverting water from a mill; by the answer and evidence it was shown that the defendants were acting by order of a canal company. The court permitted the plaintiff to amend the bill by making the company a party, allowed a replication to be filed *nunc pro tunc*, and made a decree against the company without service on them. *Held*, to be erroneous: *Id.*

Inquests of Damages in Railroad Cases—Competency of Stockholders as Jurors.—A stockholder of a railroad corporation is not competent to sit as a juror upon an inquest impannelled to determine the necessity of

taking, and the compensation to be allowed to the owner of land taken for the use of the corporation, and the verdict of a jury—one or more of whose members are thus disqualified—is void: *Peninsular Railway Co.* v. *Howard*, 20 Mich.

Railroad corporations seeking the condemnation of lands for their use must at their peril raise such objection to the competency of a juror when it is known to them; and it is the duty of the juror himself to disclose such interest: *Id.*

Criminal Law.

Certainty of Verdict.—Under an information, which, in one count of murder in the first degree, charges all the different degrees of felonious homicide, including murder in the first and second degrees, and manslaughter in its four different degrees, a verdict that finds the prisoner guilty, as charged, without specifying of what degree of the offence he is found guilty, is not such a verdict as will authorize a judgment for murder in the first degree; nor is the court authorized to look outside the verdict to ascertain that the jury intended by such verdict, a verdict of murder in the first degree: *The State* v. *Reddick*, 6 or 7 Kansas.

Debtor and Creditor.

Fraudulent Sale of Goods—Change of Possession.—Fraud in fact in the transfer of chattels, consists in the intention to prevent creditors from recovering their just debts, by an act which withdraws the debtor's property from their reach. Acts which though not fraudulently intended, yet as their tendency is to defraud creditors, if they vest the property of the debtor in his grantee, are void for legal fraud, which is tantamount to actual fraud: *McKibbin* v. *Martin*, 64 Penn.

Actual fraud is for the jury. Legal fraud, where the facts are undisputed or are ascertained, is for the court: *Id.*

The retention of possession by the vendor of chattels is a fraud in law whenever they are capable of delivery and no honest and fair reason can be given for the vendor not giving up possession to the vendee: *Id.*

Where there is evidence from which a jury could infer under instructions of the court, that there had been an actual and exclusive change of possession, the question should be submitted to them. The court is to judge whether there is sufficient evidence to infer such delivery: *Id.*

Where the subject of the sale is not reasonably capable of an actual delivery, a constructive delivery will be sufficient. In such case it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned, the change of ownership. The question is, did the vendor do all that might be reasonably expected in the case of a real and honest sale: *Id.*

In the case of a large hotel, it is enough for the vendee of the furniture, &c., to assume the direction and control of them in such an open and notorious manner as usually accompanies an honest transaction: *Id.*

The possession of the chattels by the vendee must be exclusive of the vendor. A possession which in law is concurrent is such as will lead persons to infer that there has been no actual change: *Id.*

Where there has been a sufficient delivery, actual or constructive, and the vendee is in possession, the fact that the vendor is employed

about the establishment in a capacity holding out no *indicia* of ownership, is not such a concurrent ownership as the law condemns, and the question is for the jury: *Id.*

DEED.

Parol Evidence to show Trust.—In the absence of fraud, mistake or accident, the grantor, in an absolute conveyance reciting a valuable consideration and acknowledging its receipt, and where it is admitted a valuable consideration was actually received, cannot show by a parol agreement that the grantee was to hold the land conveyed in truth for his benefit: *Morrall* v. *Waterson*, 6 or 7 Kansas.

ELECTIONS. See *Evidence.*

EVIDENCE. See *Bills and Notes.*

Bill of Sale.—In an action for the conversion of personal property, when the plaintiff never having had actual possession, bases his right to recover on an alleged purchase, if it appear that such purchase was concluded in, and evidenced by a bill of sale, such bill of sale is the best evidence of the fact and conditions of such purchase: *Barnett* v. *Williams*, 6 or 7 Kansas.

Partnership.—In a question as to E. being a partner, H. of the firm of H. & F. testified that J. was a partner and that E. asked for the books and said he had as much interest as J. *Held*, that the books of H. & F. were admissible: *Frick* v. *Barbour*, 64 Penn.

Testimony often consists in what is not proved as well as in what is proved. When withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, it is not error in the court to allude to the withholding, as a circumstance strengthening the proof: *Id.*

Qualification of Jurors—Declaration of a Party as Evidence—Competency of Jurors as Witnesses—Rebutting Evidence—Evidence of Malice—Exemplary Damages.—The formation or expression of an opinion that the defendants, as judges of election, "ought to have received the votes of all registered persons, without further question," does not disqualify a person from acting as juror in a suit against the judges for damages, for not receiving the vote of one who was registered: *Elbin* v. *Wilson*, 33 Md.

In an action for damages against judges of election for corruptly refusing the vote of the plaintiff who was registered, the fact that the defendants knew that he differed from them in his political sentiments, is admissible as an element of proof to be considered by the jury, together with other facts, in determining how far they were influenced by bias, prejudice, or corrupt motives in rejecting his vote: *Id.*

But the declarations of the plaintiff made to other parties, tending to prove that he came within the disqualifying clause of the Constitution of 1864, and which were unknown to the defendants when they rejected his vote, are not admissible as evidence to exempt them from liability: *Id.*

A grand juror cannot be required to state what efforts he made to procure an indictment against a person, what opinions were expressed by

his fellows or himself, or what was the action of any juror in regard to the subject of inquiry before them: *Id.*

A judge of election, sued by a person whose vote he had refused to receive, testified that he had rejected the plaintiff's vote because of his known disloyal sentiments, and that in doing so he was not governed by any bias or prejudice against the plaintiff. *Held:* That to rebut this evidence and to show malice on the part of the defendant, it was competent for the plaintiff to prove that the defendant, as register, had registered a person as a voter, who at the time declared the same disloyal sentiments, for the expression of which the defendant claimed to have rejected the plaintiff's vote: *Id.*

If a registered voter tenders his vote at an election, and the judges wilfully, corruptly, and fraudulently refuse to receive it, he is entitled to recover in an action against them, such exemplary damages as the jury may consider proper under the circumstances: *Id.*

Executor.

Commissions—Payment—Interest.—Commissions to accountants are due at the time the services for which they are allowed, are performed: *Parker's Estate*, 64 Penn.

A reasonable amount may be retained by an executor, &c., to pay expenses and other charges: *Id.*

When an executor pays to those entitled, within a reasonable time after funds are received, he will not be charged with interest: *Id.*

It is improper and unlawful for an executor to mix the funds of the estate with his own. In this case, the executor was on that account charged with the costs of the appeal: *Id.*

Fraud.

Fraud in obtaining a Contract, or Failure of Consideration, may be relied on as a Defence by a Party sued upon such Contract—Evidence.—In an action by the payee against the maker of a promissory note, given for the balance of the purchase-money agreed to be paid for the assignment to the latter of the exclusive right to use and sell, within certain counties in Maryland, a patented invention, it is competent for the defendant to prove, as a bar to the action, that he was induced to purchase by means of false representations on the part of the plaintiff as to the usefulness of the invention, although after having discovered that the invention was of no value whatever, the defendant made no offer to surrender or re-assign it to the vendor: *Groff* v. *Hansel*, 33 Md.

An offer to pay a part of a note in discharge of the whole, made with a view to a compromise, but not accepted, is inadmissible in evidence in a suit on the note against the maker: *Id.*

Gift.

Confidential Relation—Undue Influence.—A gift obtained by any person standing in a confidential relation to the donor, is *primâ facie* void, and the burden is thrown on the donee to establish to the satisfaction of the court, that it was the free, voluntary, unbiassed act of the donor; a Court of Equity on grounds of public policy, watches such transactions with a jealous scrutiny, and to set them aside, it is not

necessary to aver or prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal incapacity to make a will or execute a valid deed or contract: *Todd* v. *Grove*, 33 Md.

B., an aged man, blind and crippled, being possessed of considerable real estate and a very large personal property, invited his brother V., then living in Illinois, to come and live with him and take charge of his business. V. thereupon sold out his personal effects in Illinois, and with his wife and daughter came to Maryland, in October 1866, and took up his residence in the same house with his brother, and had the whole care and custody of his large real and personal estate, and acted as his agent in the transaction of all his business from that time until his death which occurred in December following. While this relation subsisted between them, in the early part of December, gifts and transfers of private securities and United States bonds to the amount of nearly $50,000, were made by B. to his brother. The donor had at the time two other brothers, a wife and numerous nephews and nieces living, as also grandchildren, offspring of a deceased natural son, who had lived in the house with him. At the date of the gifts, the physical health of the donor was greatly impaired and his mind weakened to such an extent at least, as to make it more easily the subject of influence and less able to resist importunity. It was also shown that the donee, before coming and while making his preparations to come to Maryland, had deliberately formed the purpose to acquire and exert an influence over his brother for his own advantage and that of the other heirs, to the prejudice of the wife. On a bill filed by the widow and administratrix of the donor, for the purpose of vacating and annulling the gifts and transfers made to his brother, it was *held:* That the influence which the donee possessed, from the relation in which he stood to his brother, was unduly exercised for his own advantage, and the gifts and transfers made to him were invalid and could not be permitted to stand: *Id.*

GRAND JURY. See *Evidence.*

HOMESTEAD.

Neither the constitution nor the statute exempts a contemplated future homestead; and therefore, land on which no dwelling-house had ever been erected, or commenced, and on which neither the complainant nor his family had ever resided, is not exempt as a homestead. Beecher *v.* Baldy, 7 Mich. 501, cited and approved: *Coolidge* v. *Wells*, 20 Mich.

HUSBAND AND WIFE. See *Will.*

Divorce on the ground of Cruelty—Evidence.—While it is true that in a bill for a divorce on the ground of cruelty, the specific acts on which the charge rests must be set out in the bill; the evidence is not necessarily limited to the particular facts charged. Evidence of other facts which serve to give character to the specified facts proved, is admissible. Thus, acts of personal violence, when intrinsically and separately considered, may not amount to such a degree of cruelty as to justify a divorce; yet when attended by habitual brutal behavior, so as to be a constant outrage upon the sense of decency and propriety of the party

to be affected by them, a case of extreme cruelty within the meaning of the statute is established: *Briggs* v. *Briggs*, 20 Mich.

Parol Promise to Marry.—A contract to marry not in writing, and not to be performed until after more than a year has elapsed, is void under the Statute of Frauds: *Nichols* v. *Weaver*, 6 or 7 Kansas.

Wife's Contract for Money loaned.—A party who lends to a wife money, known to him to be for her private use, and who at the wife's request conceals the fact of such lending from the husband, cannot maintain an action against the husband for the money loaned: *Franklin* v. *Foster*, 20 Mich.

Insurance.

Construction of Contract.—S. entered into a contract of insurance with the Baltimore Marine Insurance Company. The policy excluded all shipments unless approved and endorsed on the policy—the valuation to be fixed by the endorsement. By the course of dealing between S. and the company, applications for insurance were indicated by endorsing the names of the articles to be insured in a policy-book attached to the policy; and afterwards, generally on the same or ensuing day, the valuation was extended on invoices furnished by S., on application of the company. A loss having occurred, it was discovered that one item was simply endorsed in the policy-book, and that its value had not been extended, no invoice having been furnished. On suit by S. for the value of this article, *held:* 1st. That this was a valued and not an open policy, and the applicant for insurance having failed to furnish the invoice, as was his duty, was not entitled to recover. 2d. That under this running, but valued policy, each and every shipment, for the insurance of which application is made, becomes a distinct insurance to be determined by the provisions of the policy and the endorsements in the policy-book. 3d. That the contract of insurance was not complete, as to any specific shipment, until the endorsement of the value; and it was too late to ask for such endorsement when the shipment was in all probability lost: *Schaefer* v. *Baltimore Mar. Ins. Co.*, 33 Md.

Juror.

See *Corporation; Evidence.*

Landlord and Tenant.

Attornment.—Attornment is unnecessary in Pennsylvania: *Tilford* v. *Fleming*, 64 Penn.

Attornment is not required to enable the alienee to be restored to the estate when the tenant's term is ended: *Id.*

An alienee may proceed in his own name to obtain possession of premises let by his alienor: *Id.*

Attornment is not the initiation of a new lease, it is merely the assent of the tenant to the landlord's alienation, and the acceptance of the alienee as his landlord; the lease is untouched in other respects: *Id.*

Mandamus.

Where the electors of a town at a special town meeting, by resolution, authorized the supervisor, town clerk, and one of the justices to issue certificates of indebtedness to the amount of $300, as bounty to each volunteer enlisting or enlisted into the U. S. Army, and credited the said

town: *Held*, that upon the refusal of such town officers to issue to a volunteer bringing himself within the provisions of the resolution such certificate of indebtedness, a *mandamus* was the proper remedy: *The People ex rel. Vanderlin* v. *Martin et al.*, 58 Barb.

Held, also, that if the town officers had not met, no other demand of performance could be made than a several demand; and if it was necessary for the officers to meet to perform their duty, then a demand that they issue a certificate was of itself a demand, that they should meet for that purpose: *Id.*

MERGER. See *Will.*

MORTGAGE.

Absolute Deed with Covenant to reconvey.—Gubbings conveyed to Harper by absolute deed, and about the same time they agreed in writing that at Gubbings' request within three years, Harper would reconvey, Gubbings paying him an advance of $500. *Held:* that the transaction was a mortgage: *Harpers' Appeal*, 64 Penn.

Gubbings did not demand a reconveyance for nine years: *Held:* that he was not barred by the 6th sect. of Act of April 22d 1856 (Limitation): *Id.*

Whenever there is an advance of money to be returned within a specified time upon the security of an absolute conveyance, it is a mortgage, whatever the form adopted or the understanding of the parties: *Id.*

Harper on the execution of the deed took possession and after the expiration of the three years made permanent improvements, which the master found to be reasonable: *held*, that he should be allowed for these improvements: *Id.*

When property is held avowedly as a pledge, a mortgagee in possession should not be allowed for costly and permanent improvements, without the consent of the mortgagor, but he should be allowed for such repairs as are proper to preserve the estate from dilapidation, without holding him to proof of absolute necessity: *Id.*

After-acquired Property.—A railroad company under authority of law, mortgaged "all their road, *property*, rights, liberties, privileges, corporate franchises, income, tolls and receipts then held or thereafter to be acquired" "in trust for the use, benefit and security of the holders of certain bonds therein described." *Held*, that the mortgage was a lien upon engines, rolling-stock, &c., in actual use by the company and required for the transaction of its business, whether owned at the date of the mortgage or afterwards acquired: *The Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Woelpper*, 64 Penn.

One may grant the future accretions of any subject he owns at the time of the grant: *Id.*

A mortgage will pass all structures or fixtures that may afterwards be erected on land by the mortgagor: *Id.*

Contingent estates and interests are assignable in equity: *Id.*

Contingent interests may be the subject of a contract which, if made for a valuable consideration, will be specifically enforced, when the event happens: *Id.*

Equity will treat a mortgage of property, whether real or personal, to be subsequently acquired, as a binding contract: *Id.*

PARTITION.

Decree for.—Where a decree in partition required the referee to pay and discharge out of the proceeds of the sale, all taxes, charges and assessments which might be a lien on the premises: instead of which as appeared by his report of sale, he sold subject to such liens: *Held*, that the order confirming the report was erroneous, and the same was reversed and the sale set aside and vacated, as being contrary to the decree: *Hobart et al.* v. *Hobart et al.*, 58 Barb.

Where advancements have been made by a parent during his lifetime to a portion of his children, in an action between his heirs after his death, for a partition, such advancements should be provided for, in the decree. It is erroneous to adjudge and decree that each child is entitled to an equal share, as though no advancements had been made: *Id.*

If advancements have been made to a portion of the children beyond the amount of their respective shares, they will have no share or interest in the lands sought to be partitioned: and if the advancements made to such as do inherit are all different in amounts, their shares in the premises will be in unequal proportions: *Id.*

Where the rights and interests of the several parties, in a partition suit, have, by the judgment or decree, been adjudged to be altogether different from those to which they were entitled by law, *it seems* there is no way by which the error can be remedied, except by a reversal of the judgment, and the ordering of a new trial: *Id.*

PARTNERSHIP. See *Evidence.*

Notes made by Partners—Liability of Firm.—On the formation of a partnership between S. & J. under the firm name of "J. S.," a note was made by S. in his own name, which he procured to be discounted by the plaintiff, for the purpose of enabling him to pay in his share of the capital. S. did not represent to the plaintiff that it was a firm note; and the payees, as officers of the plaintiff's bank, knew or had good reason to believe, that the note was not the note of the firm, but was the individual note of S. *Held*, that J. was not liable as a party to the note in any form: and no recovery could be had against him by the plaintiff, as holder thereof: *The National Bank of Chemung* v. *Ingraham*, 58 Barb.

Held also, that even if the note had been discounted after the partnership had commenced business, the legal presumption would be that it was the note of the individual who signed it and not the note of the firm: *Id.*

That to entitle the holder to recover in such a case against the partners, it must go further, and prove, either that the money for which the note was given, was borrowed on the credit of the partnership, or that it was used, when obtained, in the business of the partnership: *Id.*

That the burthen of proof was upon the plaintiff, to show that the note was discounted upon the credit of the partnership: *Id.*

That if the lender did not know of the partnership: or if the money was loaned on the individual credit of the maker of the note: the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm: *Id.*

PLEADING.

Averment of Joint Undertaking.—In an action upon a special agreement against two persons, the plaintiff cannot recover unless he avers and proves a joint undertaking; and in such an action, evidence of an original contract, signed by one of the defendants, together with an agreement signed by the other "to become security for the performance of the foregoing contract," although alleged to have been simultaneously executed, was held inadmissible to prove a joint contract. Whether proof that both the original and the collateral undertaking were supported by the same consideration would render the undertaking joint; —*Quære: Lee* v. *Bolles*, 20 Mich.

POWER.

Intention to Execute—Situs of the Property.—The intention of the donee of a power is the criterion to determine its execution. The intention must appear in the instrument, which must refer to the power to be executed or actually dispose of its subject: *Bingham's Appeal*, 64 Penn.

The intention to execute may be ascertained, when the instrument cannot have any operation, except that the donee intended to execute the power. Merely the fact that the bequests exceed the testator's estate, will not manifest an intention to execute a power: *Id.*

The subject of a power is the property of the donor, not of the donee, in whom it is but a trust: *Id.*

An English statute provides that a bequest of personal property, &c., in a general manner, shall include personal property of which the testator had the appointment. *Held*, that such bequest by the donee residing in England, of a power created by the will of a resident of Pennsylvania, did not pass property under the will: *Id.*

The law of the *situs* of the subject of the power, controls the execution of the power: *Id.*

QUO WARRANTO.

Church-trustees.—Quo warranto is the proper remedy against persons usurping the office of trustees of a chartered church: *Commonwealth ex rel. Gordon* v. *Graham*, 64 Penn.

A motion to quash must be for some defect in the suggestion itself, not for any matters outside. Mere defects in form that can be amended, will not be regarded on a motion to quash: *Id.*

SHIPPING.

Supplies—Credit of Master.—The owners of a ship, though in a home port where they or their agents reside, are responsible for necessary supplies furnished on the order of the captain, unless it should appear that they were furnished exclusively on his credit: *Winsor et al.* v. *Maddock et al.*, 64 Penn.

Supplies furnished ship, on the order of the captain; no demand had been made on the owners for their payment until fifteen months after the last item. From these circumstances alone there could be no inference that exclusive credit had been given to the captain: *Id.*

Vendor and Purchaser.

Taking of Land for a Road.—The person to whom damages for opening a road are awarded in the first instance, has no vested right to receive them until the final order to open, and if before the final order he conveys the land, the right to receive the damages passed to the vendee: *Meginnis* v. *Nunamaker*, 64 Penn.

A vendee of land through which a road was opened after his purchase, may recover the damages from his vendor to whom they were assessed and who received them from the county treasurer: *Id.*

Extinguishment of the Vendor's Lien—Mortgage.—Where the vendor of real estate withheld the deed until nearly the half of the purchase-money was paid, and then, upon receiving the bond or note of the purchaser, with approved security for the balance, delivered to him the deed, without any agreement for preserving the vendor's lien, it must be considered as extinguished: *Carrico* v. *Farmers' and Merchants' Nat. Bank*, 33 Md.

A mortgage of real estate is valid without attestation: *Id.*

Change of Title.—Where one is in possession of property with no other claim of title thereto than a partial or conditional one, as purchaser under a void contract of sale, which each party refuses to perform, except according to his own understanding of its terms, the title of the property is not changed, and the vendor is entitled to recover such property, upon legal demand made: *Fullerton* v. *Dalton*, 58 Barb.

After demand of such property is made, the purchaser is wrongfully in possession; and his use of the property afterwards is a conversion thereof to his own use: *Id.*

Contract to purchase at Future Time.—Fisher conveyed real estate, a steamboat and other property to Reitz, with the stipulation that Reitz should reconvey within a year at the same price on three months' notice by Fisher. Fisher gave the notice; before the time for reconveyance the boat was wrecked by an ice flood. On the day fixed in the notice, Reitz tendered a conveyance of all the property, including the boat in its wrecked condition. *Held*, that Fisher was not bound to accept. The notice amounted only to an engagement to take the property sold to Reitz. It was not a present purchase, so as to vest the property in Fisher: *Reitz's Appeal*, 64 Penn.

If the personal property did not exist in the form it was when the reservation for repurchase was made, Fisher was not bound to take it, and the notice did not alter this condition. When there is a contract to purchase at a future time no title passes: *Id.*

Verdict.

Special Finding of Facts inconsistent with Verdict.—When the special findings of fact are inconsistent with the general verdict of a jury, the former control the latter, and judgment may be rendered accordingly: *Nichols* v. *Weaver*, 6 or 7 Kansas.

The Supreme Court will give the same construction to the findings

and verdict of a jury that the court below has done, unless such construction clearly appear to be erroneous: *Id.*

WILL.

Merger—Construction—Husband and Wife.—T. intermarried with H. At the time of the marriage, the wife was possessed, of a term of years renewable for ever, in a city lot. After the marriage, the husband purchased the reversion to the same lot. In the deed conveying the reversion there was no expression of a purpose to extinguish the term. T. afterwards died, his wife surviving him. *Held:*

1st. That the interest of the wife in the property was not extinguished by *merger*, but survived to her on the death of the husband;

2d. That such *merger* would be against the spirit and intention of the Act of 1853, ch. 245: *Clark* v. *Tennison*, 33 Md.

The will of a husband after devising to his wife absolutely all of his slaves, proceeded as follows: "Item. I likewise give and devise to my said wife all the rest of my estate so long as she remains my widow; at her death to be equally divided with my children, and to them and their heirs for ever." The widow afterwards married. *Held:*

1st. That the limitation of the property to the widow during widowhood, was valid and effective.

2d. That at the marriage of the widow the estate devolved on the children, it being the intention of the testator that the widow should have the property only during her widowhood;

3d. That the intention of the testator being manifest, there is no intestacy, because the will did not expressly provide what was to become of the property during the intermediate time between the marriage and death of the widow: *Id.*

LIST OF NEW LAW BOOKS.

ABBOTT.—Treatise on the United States Courts and their Practice. By B. V. ABBOTT. Vol. 2. New York: Diossy & Co.

ARKANSAS.—Reports of Cases in the Supreme Court. By N. W. COX. Vol. 25. Little Rock: Price & Barton.

BIGELOW.—Reports of all published American Life and Accidental Insurance Cases, prior to January 1871, with notes. By MELVILLE M. BIGELOW. New York: Hurd & Houghton. 1871. Shp. $7.50.

BLATCHFORD.—Reports of Cases in the Circuit Court of the United States. By SAMUEL BLATCHFORD. Vol. 7. New York: Baker, Voorhis & Co.

CINCINNATI.—Superior Court Reporter. By C. P. TAFT and B. STORER, Jr. Vol. 1, parts 1 and 2. Cincinnati: R. Clarke & Co. $5 per an.

CONNECTICUT.—Digest of Cases in the Supreme Court of Errors and the Superior Court. By SIMEON E. BALDWIN. Boston: Little, Brown & Co. Shp. $10.

COURT OF CLAIMS.—Reports of Cases in the Court of Claims. Vol. 4. By C. C. NOTT and S. H. HUNTINGTON. Washington: W. H. & O. H. Morrison.

COWEN.—The Civil Jurisdiction of Justices of the Peace in New York. By ESEK COWEN. 5th Ed., 2 Vols. New York: Banks & Bro. Shp. $10.